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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 362

UNITED STATES OF AMERICA, PETITIONER

*v.*

BETHLEHEM STEEL CORPORATION, BETHLEHEM SHIPBUILDING CORPORATION, LTD., BETHLEHEM STEEL COMPANY, FORE RIVER SHIPBUILDING CORPORATION, UNION IRON WORKS COMPANY

No. 363

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, PETITIONER

*v.*

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION

### OPINIONS BELOW

The opinions of the District Court of the United States for the Eastern District of Pennsylvania

(R. 733, 749, 752) are reported in part in 23 F. Supp. 676 and 26 F. Supp. 259. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 2323-2332) is reported in 113 F. (2d) 301.

## JURISDICTION

The judgments of the United States Circuit Court of Appeals for the Third Circuit were entered on June 18, 1940 (R. 2333). This Court granted the petition for writs of certiorari on October 14, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

During the World War, the Fleet Corporation entered into contracts with respondents for the construction of a number of ships. The contracts provided for the payment of the cost of constructing the ships, plus a fixed profit, plus a fee (known as a "bonus for savings") equal to one-half the amount by which the actual cost of the ships might be less than a stated estimate of cost. The estimated base cost of all the vessels was about $120,000,000; the actual base cost was about $93,000,000; respondents' profits under the contracts would be almost $24,000,000, about $12,000,000 of which is its claimed share of the bonus for savings. The questions are:

1. Whether respondents are entitled to a "bonus for savings" in the absence of any proof that this

provision of the contracts led to any reduction in cost.

2. Whether the "bonus for savings" provision, if it operates in the absence of any real reduction in cost, is invalid as opposed to public policy; and whether the execution of contracts containing this provision as so construed was within the authority of the Fleet Corporation officials.

3. Whether the contracts as so construed are unconscionable because of the circumstances in which they were negotiated and the aggregate profit which accrued to respondents.

## STATEMENT

*The proceedings.*—These two cases involve substantially the same questions. One is a suit in equity brought by the United States against Bethlehem Steel Corporation and certain subsidiary companies for an accounting and the recovery of sums paid to the defendants, or some of them, without authority of law, under certain contracts to build ships for the United States, represented by the United States Shipping Board Emergency Fleet Corporation (herein called the "Fleet Corporation").[1] The other is an action at law brought against the Fleet Corporation by Bethlehem Shipbuilding Corporation, Ltd. (herein called "Bethle-

[1] The name of the Fleet Corporation was subsequently changed to United States Shipping Board Merchant Fleet Corporation and the caption of the action at law appropriately changed (R. 746).

hem"), a wholly owned subsidiary of Bethlehem Steel Corporation (R. 525), to recover the sum of $7,691,400.14 claimed by Bethlehem under the aforesaid contracts, as unpaid "bonus for savings."

Trial by jury in the law case was waived (R. 509), and both cases were referred to a Special Master and Referee for hearing (R. 509, 513, 2306, 2309, 2310). The successor to the original Special Master and Referee, after making findings of fact and conclusions of law (R. 515–692), recommended the dismissal of the Government's bill in the equity suit, and of Bethlehem's counterclaims thereto; and in the law case recommended that judgment be entered for $5,272,075.10 in favor of Bethlehem against the Fleet Corporation (R. 560–566).

The District Court approved and confirmed the Master's report and findings, dismissed the bill in the equity suit and Bethlehem's counterclaim thereto (R. 2311), and in the law case entered judgment in the amount recommended by the Master (R. 760).[2] The Circuit Court of Appeals affirmed the judgments (R. 2333).

*The facts.*—In 1917 the war emergency required the United States to requisition all ships suitable

[2] Bethlehem claimed interest at six percent from specified dates; the Master recommended interest at two percent; and the District Court entered judgment without interest. In the law case, Bethlehem appealed on this issue to the Circuit Court of Appeals, which upheld the lower court's decision. (R. 563–566, 742–744, 749–751, 2330–2332.) This point is not involved here.

for war purposes which were then under construction, and to build as many vessels as possible in the shortest period of time (R. 539, 574–575). To attain these objectives, it was necessary to obtain the cooperation of and to place contracts with Bethlehem, the largest shipbuilding concern in the world (R. 539, 574). There was no feasible alternative to the awarding of contracts to Bethlehem (R. 539). These emergency needs were well known to Bethlehem and its agents (R. 575, 1362).

Between February 1, 1918, and July 15, 1918, the Fleet Corporation entered into eighteen contracts with Bethlehem for the construction of a large number of vessels (R. 520, 109–307). Of the thirteen contracts in controversy, seven were awarded on January 5, 1918, and executed on February 1, 1918 (R. 520, 1921, 1966),[3] after negotiations begun in December of the preceding year (R. 527, 578). Bethlehem was represented in the negotiations by two exceptionally competent shipbuilders, Powell and Brown; Powell was vice president and operating manager of Bethlehem, and Brown was technical manager of Bethlehem. Charles Piez, vice president and general manager of the Fleet Corporation, had exclusive authority to negotiate its contracts. The actual negotiations were conducted for the Fleet Corporation by Bowles and

[3] These contracts are Nos. 177, 178, 179, 183, 184, 191, 196, copies of which are set forth at R. 109–146, 158–196, 2089–2114.

Radford, shipbuilding experts said by the Master to be as able as those of Bethlehem (R. 527, 575–577). Piez, was a business executive of long experience but was without any shipbuilding experience (R. 527, 646). The Master found that the negotiations were conducted at arm's length (R. 527); he also found that Piez and Powell were "very close," and that Piez had "implicit confidence in Powell's integrity" and "was accustomed to look to him for information and assistance" in shipbuilding matters (R. 646).

Throughout the course of these negotiations the Fleet Corporation made repeated but unsuccessful efforts to enter into "lump sum" contracts (R. 626–627, 643). Bethlehem, however, insisted upon its "bonus-for-savings" form of contract, which Powell had originated, and would not undertake construction under any other type of contract (R. 627, 642–643, 738). These contracts provided that the price paid Bethlehem should be (1) the actual cost of construction, plus (2) a fixed profit, amounting to about 10 percent of the estimated base cost, plus (3) the "bonus for savings," equal to one-half of the amount by which the actual cost fell below the estimated base cost (*e. g.*, R. 117–118; cf. R. 572). Under these contracts, then, Bethlehem took no risk of any loss and was assured a profit of about 10 percent of the estimated cost; in addition it would receive 50 percent of the amount by which the actual cost should be less than the estimated base cost.

It was understood, as the Master found, that Bethlehem's participation in the "savings" bonus was supposed to represent "consideration for its special efforts and ability to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing" (R. 638). The Master, however, made a further and, as we show below, inconsistent finding that Bethlehem was to participate in savings "however earned" (R. 637).

The estimates of base cost, crucial in fixing the extent of Bethlehem's profits under these contracts, were prepared by Bethlehem alone (R. 643–644). The estimates as prepared by Brown were shown in these proceedings to have contained large allowances for (a) decrease in efficiency (R. 1856); (b) increase in freight rates and delivery cost (R. 1855); (c) increase in prices of materials (R. 611, 631); and (d) extraordinary contingencies (R. 1857). The extent of these allowances is suggested by the fact that it was assumed that wage rates would increase by 29 percent, that there would be a 30-percent decrease in efficiency of labor, that freight rates would increase by 42 percent, and that a flat 10 percent of the total cost should be added to cover contingencies (R. 1855–1857). The allowance for a rise in material price was admittedly excessive (R. 1047, 1252, 1268, 1548); the overhead items were figured as a percent of the markedly increased labor costs, and even on that basis made virtually no allowance for capacity operation (R. 855, 1051–1053). The resulting figures Powell substantially increased prior to the

Fleet Corporation negotiations, as he admitted, "for trading purposes" (R. 672).

In accordance with his fixed determination, made in advance of the negotiations, Powell refused to go below Brown's estimates (R. 528, 642, 1090, 1377) and the contracts were executed substantially on this basis (R. 686). Bethlehem insisted that because of the "unprecedented conditions surrounding the labor and material market, it is impracticable to estimate within a reasonable percentage what will be the actual cost of construction" (R. 627) and that the estimates finally incorporated in the agreements were the lowest which would afford Bethlehem a reasonable opportunity to effect savings as a result of increased efficiency of management and labor (R. 639–640).

The basis upon which these estimates had been made up was not revealed to the Fleet Corporation (R. 672). The only break-down of the costs of the various types of ships offered on Bethlehem's behalf during the negotiations was represented to be "based upon a close study of the facts affecting cost" (R. 585), but the Master found it represented merely "an arbitrary division of the total cost estimates" and that it was "submitted for the purpose of lending a semblance of support to such estimates" (R. 641). While the Master found that the representatives of the Fleet Corporation had knowledge, or information available from which knowledge could have been obtained, by which they could judge of the reasonableness of the estimated base price for the ships (R. 538), this information

consisted solely of the prices which it paid other shipbuilders in a very limited number of contracts previously executed, particularly "lump sum" contracts of a very different nature from those in controversy (R. 688, 1619–1620, 1507–1508, 1407–1408; see *infra*, pp. 61–62). The representatives of the Fleet Corporation at no time presented any estimates of their own (R. 644).

The Master found that it was impracticable to estimate the cost of construction within a reasonable percentage at the time of the negotiations (R. 530), that Brown's estimates were as accurate as could be expected under such circumstances (R. 683) and that Bethlehem had been guilty of no fraud or misrepresentation during the negotiations (R. 689). Bethlehem, however, was in a much better position to judge the reasonableness of the estimates than was the Fleet Corporation. Except for seven of the smaller cargo ships, all of the vessels covered by the contracts in controversy were Bethlehem's standard types of ships, being duplicates of or substantially similar to ships which had been recently constructed at its shipyards, or which were under construction at the time of the negotiations (R. 591–594). This experience gave Bethlehem a mass of cost data, so that at the time of the negotiations it was in a position to determine the cost of constructing similar ships in the past (R. 594–597, 613–614). It was contemplated that the efficiency of labor would be considerably increased by the fact that the ships to be built were of but few types and were similar to Bethlehem's standard

types of ships (R. 608). The Fleet Corporation's position was wholly different. It was entirely without information as to Bethlehem's costs (R. 620–621) and, while the Master thought it "fair to assume" that "equivalent costs" were available, the Fleet Corporation's only information related to prices paid other shipbuilders in a few other contracts of a different character (R. 1619–1620, 1507–1508).

The representatives of the Fleet Corporation were convinced that the terms demanded by Bethlehem were harsh, and that Bethlehem hoped to make a substantial profit from the transaction (R. 529, 531). The terms were accepted by the representatives of the Fleet Corporation only because they were the best that could be obtained "under very difficult conditions" (R. 531, 646). While the Government could in theory have taken possession of the Bethlehem plant, it was felt that Bethlehem's organization was necessary to assure the success of the Fleet Corporation's shipbuilding program (R. 531, 539). Since the Government could not compel performance by an "unwilling organization" (R. 539), the representatives of the Fleet Corporation entered into the contracts, although resenting the commercial attitude of Bethlehem and condemning Bethlehem for demanding its "pound of flesh" (R. 539). The Master and both courts below agreed that the Fleet Corporation had no real freedom to reject Bethlehem's harsh terms (R. 539, 738, 741, 2328).

The remaining six contracts in controversy[4] executed after February 1, 1918, embodied substantially the same terms as the earlier agreements. At the time these contracts were entered into, the Fleet Corporation was able to compare the estimates of base cost in Bethlehem's offers with the cost to the Government of vessels constructed by other shipbuilders (R. 554), but had no knowledge of the basis of Bethlehem's estimates or its costs (R. 618–623). In the case of four of these contracts, the Government agreed to the same fixed fees as in the earlier agreements, but proposed a slight reduction of the estimated cost which would result in all but one case in a fixed fee of exactly 10% of such cost (R. 1836, 1839, cf. R. 130–131, 143; 1844, 1848, cf. R. 166–167; R. 1845, 1848, cf. R. 205–206; R. 1845–1846, 1848, cf. R. 118, 218). In the case of another contract, involving a new type of vessel, the Fleet Corporation proposed a reduction in both the estimated base cost and the fixed fee where, as respondents suggested in the court below (Br. pp. 53–54), Powell again had apparently added an arbitrary sum to Brown's estimate (R. 1844–1845, 1849–1850). In another, Bethlehem agreed to split the difference between its proposal and that of the Fleet Corporation (R. 1834, 1840, 1841, 1847, cf. R. 179–180). In all cases, the Fleet Corporation's proposals were made in response to Bethlehem's offer

[4] Contract Nos. 226, 230, 299, 300, 301, 314 (R. 197–258, 270–282).

and were subject to the acceptance or rejection of Bethlehem (R. 1839–1840, 1849, 1851). Bethlehem refused to make substantial reductions when suggested by the Fleet Corporation (R. 649–651, 652–653, 1838, 1841). The conclusion of the Master and the courts below that the Fleet Corporation had no real freedom of choice fully applies to these agreements as well as to the earlier ones (R. 539, 738, 741, 2328).

Actual construction proved that the estimated cost was inordinately high. The total estimated cost had been fixed at $119,750,000 while the actual base cost turned out to be $92,990,520.91, a difference of $26,759,479.09 (R. 572). For this discrepancy between estimate and actuality Bethlehem offered no justification (R. 674). There is, as the Master found, "no evidence that the cost of construction of the respective tank and cargo ships in controversy was reduced as a result of the 'bonus-for-savings' provisions of the respective contracts" (R. 678).[5]

Bethlehem has already received the total cost (including the additions due to wage increases and

[5] The statement of the Circuit Court of Appeals (R. 2330) that "the record contains some evidence tending to show that the savings resulted, in part at least, from increased efficiency" is not in conflict with the Master's finding. The Court of Appeals does not indicate the nature or the extent of any such savings, and, as we show below, it affirmatively appears that an increase in efficiency occurred only in labor costs and that all the increase in efficiency of labor occurred after the Armistice, due to the restoration of peacetime conditions, and was wholly unrelated to Bethlehem's own efforts.

extra work) and, in addition $11,962,400 as fixed profits and $8,093,156.60 as a bonus for savings, or total profits of $20,055,556.60 (R. 572, 1642–1721). In these suits more than $7,500,000 additional was asked for and judgment was awarded for $5,272,075.10, about $3,800,000 of which recovery represented bonus for savings on the contracts here in issue.[6] Bethlehem, which assumed no risk of loss, has thus been awarded profits on these contracts amounting to approximately $24,000,000, representing an average profit of about 26 percent of the actual base cost and 22 percent of the actual costs including extra work (*cf.* R. 572 and R. 554). These figures do not take into account any profits made by Bethlehem Steel Company, an affiliate, on the sales to Bethlehem of substantial amounts of materials used in the construction of the vessels (R. 604).

### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the "bonus for savings" provisions required that the bonus be paid regardless

[6] In their Brief in Opposition to the Petition for Writs of Certiorari (pp. 7–8), Respondents may have given the impression that at least to the amount of $1,716,091.36 the judgment below did not represent profits. It is true that not all of the recovery related to the 13 contracts involved here, but practically all of it did represent profits, either on these contracts or on others not now in dispute.

of the existence of savings due to increased efficiency.

2. In failing to hold the "bonus for savings" provisions of the contracts, as those provisions were construed by it, invalid and unenforceable for want of consideration and failure of performance.

3. In failing to hold that there is no evidence that any savings resulted from increased efficiency or unusual effort due to the "bonus for savings" provisions.

4. In failing to hold that, as construed by it, and in the circumstances revealed by these cases, the "bonus for savings" provisions were unenforceable and invalid as contrary to public policy.

5. In failing to hold that, in the circumstances under which these contracts were executed, the profits made by Bethlehem were so inordinate and unconscionable as to bar recovery by respondents of any further profits, and to require respondents to account for excessive profits already received.

6. In failing to hold that, if the contracts are to be construed as the court below has construed them, and are enforceable as so construed, the officials of the Fleet Corporation had no authority to enter into such contracts, and it was a breach of their fiduciary duty to do so.

7. In affirming the judgments of the District Court.

## SUMMARY OF ARGUMENT

Bethlehem's profits under the fixed-fee provisions of these contracts amount to almost $12,000,

000, or about 10.9 percent of the actual cost. We do not contest its right to retain these profits. We insist, however, that Bethlehem can recover none of the additional $12,000,000 profits which it claims under the bonus-for-savings provisions of the contracts.

## I

The Master and the District Court found that there was no evidence that the difference between the actual and estimated costs of the vessels was due to any increase of efficiency due to Bethlehem's efforts. The opinion of the court below is in accord.

The evidence, if it be examined, makes it plain that no reduction in the cost of the vessels resulted from the bonus-for-savings provisions.

The records of actual cost (Exb. B 32) show that an increase in efficiency occurred only in the case of labor costs. Material and overhead costs varied erratically, and it clearly appears that no increase in efficiency resulted in respect of these costs. Bethlehem makes no suggestion to the contrary.

The increase in efficiency of labor was not due to any efforts of Bethlehem but resulted solely from a restoration of peacetime conditions. Such was the uncontradicted testimony of the witness Brown, employed by Bethlehem for the purpose of assisting in this case, and his testimony is confirmed by that of Powell and Piez. Indeed the record is bar-

ren of any explanation of the methods, if any, employed by Bethlehem to increase labor efficiency.

## II

The parties intended that Bethlehem should participate in savings only if the savings were brought about by an increase of efficiency resulting from Bethlehem's special efforts. The Master's finding that Bethlehem was intended to share in savings "however earned" (R. 637) is inconsistent with his finding that the parties intended the bonus "as consideration for its special efforts and ability to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing" (R. 638), and is not supported by substantial evidence.

The contracts required Bethlehem to use its "best efforts" in protecting the interests of the Government, a normal obligation of straight cost-plus wartime agreements, and even in the absence of such a provision such an obligation would be implied. Bethlehem thus undertook to maintain the normal standards of efficiency without compensation other than the fixed fee. If the literal language of the bonus-for-savings clause be deemed to create an ambiguity, resort may be had to the explanations of the parties to the negotiations. The testimony of these parties leaves no doubt that Bethlehem was not to share in "savings" save as a result of an increase of efficiency due to its special efforts.

The witness Powell expressly testified that the bonus-for-savings clause was intended to provide an incentive for efficiency, and that while the estimates of cost were "liberal," Bethlehem expected to profit by savings only by increasing the efficiency of its yards. Piez testified to the same understanding.

The fact that the estimates of cost were "liberal" and were meant to be so by both parties provides no support for the contention that Bethlehem was intended to participate in "savings" however earned. The estimates were "liberal" in order to provide an incentive to increase efficiency, not to permit additional compensation without additional effort. Nor can it be suggested that the bonus-for-savings clause, as construed by the Government, could be provocative of disputes and hence that the parties could not have intended such an interpretation. Conditions or requirements of like generality are found throughout those contracts and are common in commercial agreements.

## III

The bonus-for-savings clause, as construed by Bethlehem to permit it to share in "savings" however caused, is void and unenforceable for a want of a separate consideration. The sole advantage of the clause ever suggested by anyone is that it offers an incentive to increase efficiency through special efforts and thus to keep costs down. It cannot be

justified as a device to increase the stated fee for performance on a cost-plus basis. In this view, the clause can be sustained only if supported by separate consideration, since no public officer has any authority to bind the Government to pay something for nothing. Such has been the settled rule of the Court of Claims in cases involving identical provisions.

It cannot successfully be contended that proof of special efforts resulting in savings is impracticable and that the enforcement of the clause without such a showing is nevertheless in the public interest. The nature of the estimates of costs in these contracts readily permit such a showing if it has any foundation in fact.

## IV

The bonus-for-savings provisions so construed are void and unenforcible because of the circumstances under which they were negotiated and because they permit Bethlehem inordinate profits.

A. Under the established practice of the Navy and War Departments, the Fleet Corporation, and other branches of the Government, the maximum fee allowed for similar services when these contracts were made was 10% of the actual or estimated cost in straight cost-plus contracts. The suggestion that 10% would be inadequate for an old-line company such as Bethlehem finds no recognition in practice and is without substance in fact.

This should be the measure of the compensation to which Bethlehem is entitled, since it neither furnished nor was obliged to furnish services other than those obligated under straight cost-plus contracts. It is immaterial that the total cost under the bonus-for-savings form of contract proved to be less than that paid to other shipbuilders under lump-sum and cost-plus agreements. The fact, if true, is not due to any service rendered by Bethlehem to which the Government was not entitled in the absence of a bonus-for-savings clause. The fair compensation for Bethlehem services must be measured by its own costs and not those of other shipbuilders. Moreover, the comparison is wholly unreliable since most of the other shipbuilders operated under lump-sum contracts, incurring a substantial risk, and the few cost-plus contracts were averaged in the total.

The contention that these contracts must be judged as of the time they were executed and that so viewed they are fair and reasonable is without substance. The estimates of cost made were known to include large allowances for wartime contingencies which might never occur. The contract, as construed by Bethlehem, thus contemplated large profits even though the savings resulted from the nonoccurrence of such contingencies without any additional risk or efforts by Bethlehem and even though the Government received nothing to which it would not have been entitled to under a straight cost-plus agreement. In fact such was the cause of the "savings."

B. There can be no doubt that Bethlehem refused to undertake the construction of the vessels save under a bonus-for-savings form of agreement and on the basis of its own unexplained estimates of cost. There is likewise no doubt that the Fleet Corporation regarded these terms as harsh and accepted them only because they were the best which could be secured under "very difficult conditions" and because Bethlehem's organization was essential to the success of its shipbuilding program.

In such circumstances the courts may disregard the letter of the contracts and enforce them according to their justice. While the common law has not usually recognized economic duress as a ground for setting aside a contract, the courts of this country have frequently refused to enforce agreements entered into by private parties in circumstances of distress which made refusal impossible. The Government, since the ships were an indispensable element of its war efforts, had no option but to accept Bethlehem's minimum terms. It did not have the freedom always available to private persons, to do without because the price is high, and so acted under duress.

Bethlehem should therefore be permitted to receive no more than the fair value of its services. The maximum allowance on this basis is cost plus the fixed fee.

C. Even if the Fleet Corporation entered into the contracts without legal duress the contracts as contrued by Bethlehem are unconcionable. If the parties had expressly stipulated for a fee of 20%

or 25% of actual or estimated cost on a straight cost-plus basis it cannot seriously be doubted that the agreements would be condemned as unconscionable. A fee more than twice the usual amount for similar services could have no relation to the value of the services and could only be exacted by trading on the Government's necessities. It is immaterial that sane men would agree to such terms by reason of a war emergency. The test is not merely whether the contract is one which a man in his senses would agree to but whether the terms are such that fair and honest men would accept. Judged by this standard, a provision expressly allowing more than twice the normal charge in Government wartime contracts would seem plainly unconscionable. The bonus-for-savings provisions, construed to contemplate and to accomplish the same result, stands on the same footing.

D. Upon any one of the foregoing considerations the Government officers were without authority to bind the Government to such a contract. We do not ask the Court to go behind the expert judgment of the executive officials, but simply to free the Government of contract provisions exacted from men unable to refuse.

## ARGUMENT

The Government's position in this case is simple: Bethlehem neither in law nor in equity is entitled to profits amounting to almost $24,000,000 upon contracts in which it assumed no risk of loss whatever.

We do not contest the right of Bethlehem to retain its "fixed fee" amounting to almost $12,000,000 or about 10.9 percent of the actual cost of the contracts (see R. 572). We insist, however, that Bethlehem can claim nothing under the bonus-for-savings provisions of the contract.

If Bethlehem had in fact produced the so-called savings through increased efficiency due to its own special efforts, we should not contest Bethlehem's right to recovery. But in fact Bethlehem's claim to an additional $12,000,000 profit rests simply on the fact that its cost estimates submitted to the Fleet Corporation were about $24,000,000 above actual cost.

In these circumstances the bonus-for-savings provisions do not warrant Bethlehem's recovery of the additional profits claimed under these provisions. This conclusion is required for each of several reasons: (1) The bonus-for-savings provisions permit bonus payments only upon a showing that the savings were accomplished through special efforts by Bethlehem to increase its efficiency. (2) If construed to permit Bethlehem to participate in "savings," however caused, the bonus-for-savings provisions are void and unenforcible because: (a) they would be a separate agreement for the Government to make a gift; (b) they were exacted under duress; and (c) they are unconscionable and operate to present Bethlehem with inordinate profits.

## I

### THE "SAVINGS" DID NOT RESULT FROM AN INCREASE IN EFFICIENCY DUE TO BETHLEHEM'S EFFORTS

1. *The Findings Below.*—The Master found (R. 678) that there was "no evidence that the cost of construction of the respective tank and cargo ships in controversy was reduced as a result of the 'bonus-for-savings' provisions of the respective contracts." Bethlehem neither excepted to this finding (R. 712–713), nor requested any different finding from the Master (R. 681–692). The District Court adopted the Master's findings (R. 742); in addition, the opinion of the Court discusses the bonus-for-savings provisions upon the assumption that Bethlehem contributed nothing to cause the "savings" (R. 737–742).

The Circuit Court of Appeals, however, said, "We need only add that the record contains some evidence tending to show that the savings resulted, in part at least, from increased efficiency" (R. 2330). As we show below, this statement, if it is to find any support in the record, means only that there was an increase in labor efficiency after termination of the war, and not that it resulted from Bethlehem's efforts. It is, therefore, not inconsistent with the findings of the Master and the District Court. It is to be noted that the Circuit Court of Appeals affirmed without qualification (R. 2333) the judgment of the District Court which expressly adopted and confirmed the findings of the Referee and Special Master (R. 760–1).

The findings of the Master and the District Court, not excepted to by Bethlehem, and not contradicted by the Circuit Court of Appeals, relieve this Court of the necessity of examining the evidence. Compare *Crawford* v. *Neal*, 144 U. S. 585, 596; *Davis* v. *Schwartz*, 155 U. S. 631, 636–7; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 261; *Greey* v. *Dockendorff*, 231 U. S. 513, 514. But, if that examination be made, it is plain that the "savings" did not result from any special efforts by Bethlehem to increase its efficiency.

2. *The Evidence.*—Bethlehem cannot urge that the savings are to be traced to its efforts to increase efficiency. And the records of actual cost (Ex. B 32, R. 1932) conclusively show that no increase in efficiency resulted from the "bonus-for-savings" clause. A comparison of comparable costs of vessels constructed under successive contracts show both marked increases and decreases in material and overhead costs (Ex. B 32), plainly negativing an increase in efficiency in respect of these two elements of cost. In fact, there is no suggestion in the record that Bethlehem made any special effort to reduce such costs, and Bethlehem never has and does not now make any contention that the difference between estimated and actual cost resulted from Bethlehem's special effort or any increase of efficiency in respect of such costs. The only element of cost showing a progressive decline is labor cost and it is as to this cost alone that Bethlehem has ever suggested that the saving resulted from an increase of efficiency or that it

made any effort to reduce cost (R. 1368–1369, 1449–1450; see Brief in Opposition, p. 24, n.).

A comparison of the cost of the 10,100-ton tankers constructed at the Union shipyard under the early contract, No. 177, with similar tankers built at Union under the later contract, No. 301, shows the following (Ex. B 32):

| Contract No. | Labor | Material | Plant operating and overhead |
|---|---|---|---|
| 177 | $547,661 | $848,497 | $266,958 |
| 301 | 429,553 | 696,338 | 237,138 |

A comparison of 10,100-ton tankers built at Sparrows Point shipyard under the early contract, No. 179, with similar vessels constructed under subsequent successive contracts, Nos. 226 and 300, at the same yard, shows the following:

| Contract No. | Labor | Material | Plant operating and overhead |
|---|---|---|---|
| 179 | $538,206 | $739,265 | $281,455 |
| 226 | 496,575 | 682,503 | 264,582 |
| 300 | 459,050 | 657,141 | 277,667 |

The cost of the cargo vessels built at Union under the early contract, No. 191, compares with that of similar vessels constructed at Union under subsequent successive contracts, Nos. 230 and 301, as follows:

| Contract No. | Labor | Material | Plant operating and overhead |
|---|---|---|---|
| 191 | $903,632 | $689,191 | $163,005 |
| 230 | 444,997 | 799,077 | 187,134 |
| 301 | 415,800 | 808,339 | 273,208 |

A comparison of costs of similar cargo vessels constructed at Sparrows Point shipyard under the early contract No. 196 and the subsequent contract No. 226 shows the following:

| Contract No. | Labor | Material | Plant Operating and Overhead |
|---|---|---|---|
| 196 | $379,907 | $429,932 | $175,082 |
| 226 | 317,311 | 496,669 | 193,743 |

The cost of the 9100-ton tankers constructed at Fore River under Contract No. 183 compares with the cost of the similar vessels built under the subsequent Contract No. 299, as follows:

| Contract No. | Labor | Material | Plant Operating and Overhead |
|---|---|---|---|
| 183 | $483,028 | $729,676 | $295,300 |
| 299 | 404,442 | 669,470 | 304,029 |

(See also R. 1931.)

A comparison of the cost of the Harlan 7500 ton tankers constructed under early Contract No. 178 and the later Contract No. 314 shows the following:

| Contract No. | Labor | Material | Plant Operating and Overhead |
|---|---|---|---|
| 178 | $589,004 | $625,288 | $460,631 |
| 314 | 384,586 | 603,893 | 322,570 |

These comparisons show that there was a progressive or consistent decline in costs only with

respect to labor costs.[1] The cost of materials, as compared with earlier contracts, rose in four instances and fell in four. The costs of plant operation and overhead, which might be expected to be peculiarly sensitive to an increase in efficiency, fell in only three instances and rose in five. These comparisons, then, leave no doubt that so far as these savings resulted from an increase of efficiency, it occurred only in the matter of labor costs. All other costs varied up and down in a manner which cannot be reconciled with any increase of efficiency in these respects. Bethlehem makes no suggestion to the contrary.

It is equally clear that the increase in efficiency of labor was due solely to early termination of the war resulting in the restoration of peace-time conditions and had no relation whatever to any efforts of Bethlehem. Brown's estimates, it will be recalled, allowed for a decrease of efficiency of labor of 30% due to the disorganization caused by the war. Brown, who was reemployed by Bethlehem in 1924 to assist in connection with this case (R. 922–923), testified that he had made a careful study of the trend of Bethlehem's labor costs and that this study showed that the efficiency of labor prior to the Armistice decreased more than 30%, and that all the increase of efficiency occurred after that date (R. 1531–1537, 988–989, 1063).

[1] The comparisons referred to are the only ones which can be made on the basis of Exhibit B 32 between similar vessels constructed at the same yards.

On the termination of the war, Piez testified, "things changed very decidedly. Overtime work was cut out; night work was cut out; inefficient men were dropped; there was a very big cut in the payrolls; and the only efficient [*sic*] men were kept" (R. 1528). And Powell insisted that it was "purely a guess" whether any savings could have been realized if all the construction program had been carried on under war conditions (R. 1442, see 1370).

Indeed, there is no indication that Bethlehem made any effort to increase labor efficiency beyond continuing in effect the methods established prior to the negotiation of these contracts. Bethlehem's evidence on the point, so far as we have been able to determine, is the testimony of Powell at pages 1367–1371 and 1436 of the record. Powell testified that at the time the contracts were negotiated, the demand for labor had so far exceeded the supply that "labor was completely out of hand. * * * There was no discipline in the yards, unionism was rampant" and the labor situation was the worst in his experience (R. 1367-1368). If the conditions which prevailed at Harlan had spread to the other plants, so Powell testified, Bethlehem would "not have made a nickel" (R. 1368). He further testified that eventually Bethlehem got the conditions at Harlan "in hand" and did improve them, although they

were never as good as at other yards "until after the war was over" (R. 1368). At Sparrows Point, he stated, there were difficult transportation and housing problems, and conditions there were "much less satisfactory" than at Union and Fore River (R. 1368). What conditions prevailed at these latter yards and what improvements were made, Powell did not specifically state. He did testify, however, that Bethlehem was "very successful, under the conditions," in giving its "foremen and bosses" an incentive to increase the efficiency of the yards, but that the "early" termination of the war "undoubtedly" assisted Bethlehem to do this (R. 1369–1370). Bethlehem began to get "better control" of labor from early 1918 (R. 1436), according to Powell, but the witness did not identify the date at which labor efficiency increased (R. 1436). If his vague and general testimony is to be construed as evidencing any increase of efficiency before the Armistice, it is obviously in direct conflict with the thoroughly documented testimony of Brown previously discussed.

Moreover, Powell made no mention of the methods, if any, by which any increase of efficiency was brought about. Prior to the execution of the contract, Bethlehem had instituted a new system of specialization and training of workmen to increase efficiency which was rapidly developed during the latter part of 1917 (R. 608), and prior to the ne-

gotiations the Fleet Corporation had also established a service department for the purpose of obtaining an adequate supply of trained labor (R. 607). In view of these efforts, it is very significant that Powell made no mention of any additional methods for increasing efficiency after the agreements with the Fleet Corporation were negotiated.[8] The inference is plain that the increase in efficiency of labor was due solely, as Brown indicated, to the restoration of peacetime conditions, and had no relation to the inauguration of any methods by Bethlehem to increase efficiency.

The Master's finding that there was no evidence that savings resulted from the bonus-for-savings clause is thus amply supported by the record, even if Bethlehem were in a position to challenge its accuracy.

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[8] Powell also testified that in the disorganized state of the labor market caused by the War, Bethlehem's operations were interrupted by a number of strikes over wages and hours and "the union question" (R. 1429–1430). One effective means of eliminating such difficulties, as this Court has recognized (*Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 545–546; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42) is to encourage collective bargaining. Powell's vague and general testimony (R. 1267–1370, 1429–1430, 1435–1436) contains no suggestion that this or any other method of improving labor efficiency was put into effect during the period of construction under these contracts.

## II

### THE CONTRACTS PERMIT THE BONUS PAYMENTS ONLY UPON A SHOWING THAT BETHLEHEM BY SPECIAL EFFORTS INCREASED ITS EFFICIENCY

The Master found that Bethlehem was intended to participate in savings regardless of how they were earned (R. 637). This conclusion, even if it be viewed as a question of fact rather than law, is, as we shall show, at war with his detailed subsidiary findings and with the testimony on which they are based. This Court may, therefore, disregard the ultimate conclusion, even if concurred in by two courts, in favor of the circumstantial findings. Cf. *United States* v. *Esnault-Pelterie*, 303 U. S. 26, 31.

It has never been suggested in this case that the bonus-for-savings provisions had any purpose other than to increase the efficiency of the contractor's performance. The sole question is whether the operation of these provisions is to be limited in accordance with their purpose.

1. *The Terms of the Contract.*—The contracts between the Fleet Corporation and Bethlehem followed a standard pattern.[9] The first of these, contract No. 177, may be taken as illustrative (R.

[9] The 13 contracts in issue here appear in the record as follows: Contract No. 177, R. 109; No. 178, R. 122; No. 179, R. 135; No. 183, R. 158; No. 184, R. 2089; No. 191, R. 171; No. 196, R. 184; No. 226, R. 197; No. 230, R. 210; No. 299, R. 222; No. 300, R. 234; No. 301, R. 246; No. 314, R. 270.

109–121). Article I provides that "the Contractor shall forthwith proceed with the construction of twelve (12) steel tank vessels, each of about ten thousand one hundred (10,100) tons dead weight carrying capacity" (R. 110). Other Articles provide for alterations (II, R. 111), casualty insurance (IX, R. 111–112), obedience to Fleet Corporation labor orders (X, R. 112) and use of the Fleet Corporation powers to obtain priorities (XII, R. 112–113), and methods of paying and accounting for Bethlehem's actual costs (XV, XVI, XVII, R. 113–117). Bethlehem's claim to the bonus-for-savings is based on Article XIX, which provides (R. 118):

> Should the actual cost be less than the estimated * * * cost * * *, the contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit of * * * $210,000, one-half the amount by which such actual cost of each vessel falls short of the estimated cost * * *.

Bethlehem urges that the inquiry as to the interpretation of the contract should stop here, and that under this provision it is entitled to $2,741,287.33 additional profits, or one-half the amount by which the estimated cost exceeded the actual cost (see R. 572). But the contract is to be interpreted as a whole. So read, we urge, it imports an undertaking by Bethlehem to do something to justify this separate and extraordinary payment.

Bethlehem was under a definite obligation to the Fleet Corporation to maintain a certain standard of efficiency and good faith without any special award. The contract, in Article XXIII (R. 120), provided that Bethlehem "in all its acts hereunder, shall use its best efforts to protect and subserve the interest of the Owner." This was a typical provision of wartime cost-plus contracts containing no bonus-for-savings allowance. See, e. g., *United States* v. *A. Bentley & Sons Co.*, 293 Fed. 229, 235 (S. D. Ohio); *United States* v. *George A. Fuller Co., Inc.*, 296 Fed. 178, 180 (D. Kans.). Even in the absence of such a provision, the law would impose a similar obligation.[10]

Bethlehem itself, during this same period, had entered into contracts with the Government which did not contain this bonus-for-savings provision (R. 655). The additional provision, when read against the other provisions of the contract and the

[10] See, e. g., *United States* v. *A. Bentley & Sons Co.*, *supra*; *United States* v. *George A. Fuller Co., Inc.*, *supra*; *Westendorf* v. *Dininny*, 103 App. Div. 593, 594 (1st Dept.); *Title Guarantee & Trust Co.* v. *Pam*, 155 N. Y. Supp. 333, 336–337 (Sup. Ct.), aff'd 192 App. Div. 268, at 322 (1st Dept.), aff'd on other grounds 232 N. Y. 441; *Hoggson Bros.* v. *Spieker-man*, 175 App. Div. 144, 148 (1st Dept.); *Hitt* v. *Smallwood*, 147 Va. 778, 787; *Rutland Sash & Door Co., Inc.* v. *Gleason*, 98 Vt. 215, 220–221; *Jamieson Construction Co., Ltd.* v. *Lacombe & N. W. R. Co.* [1926], 2 D. L. R. 653, 655 (Alta. Sup. Ct.); *Burke & James, Inc.* v. *United States*, 63 C. Cls. 36; cf. *Johnson* v. *Kusminsky*, 287 Pa. 425, 430; *Lytle, Campbell & Co.* v. *Somers, Fitler & Todd Co.*, 276 Pa. 409, 419; *Union Supply Co.* v. *Morris*, 220 Cal. 331; *Annan* v. *Woods*, 158 La. 663.

normal practice of Government contracting, must have imported an additional performance on the part of the contractor as a condition of participation in "savings." The additional performance could be nothing but a reduction by Bethlehem, if it was to secure these additional and riskless profits, of the actual cost below estimated costs through special efforts to increase its efficiency. The only alternative is the unreasonable interpretation that Bethlehem was to receive the added compensation simply as a reward for the inaccuracy of its estimate of actual costs.

Viewed most favorably to Bethlehem, this unreasonable interpretation of the bonus-for-savings provision is at war with the inferences from the "best-efforts" provision, and creates an ambiguity requiring an examination of collateral evidence as to the intention of the parties. *Van Sycke* v. *Arsuaga*, 231 U. S. 601, 611–613; *Metcalf* v. *Williams*, 104 U. S. 93, 97–98; *Wheelwright* v. *Pure Milk Association*, 208 Wis. 40; *Dorrington* v. *Manning*, 135 Pa. Super. 194, 200; *McGrath* v. *Quinn*, 218 Mass. 27, 29.

2. *The Understanding of the Parties.*—The evidence clearly shows that the parties intended this construction of the contracts.

Powell, who originated the clause (R. 627), gave the following unequivocal answer to a direct question from his counsel:

> Q. So that, if Bethlehem was to make any money out of these contracts in excess of the

fixed fee, it was your judgment that the only way to do it was by increasing the efficiency of the yards?

A. Exactly (R. 1369).

And he later was equally explicit:

> The estimate was a figure which we had to shoot at that in my judgment gave us a reasonable profit or a chance of making a substantial saving. To make that saving, we had to operate more efficiently than what we might say was average efficiency under conditions that then existed. If we were going to make that saving, we had to overcome any increased cost due to decreased efficiency, and increase efficiency beyond what it was at that time (R. 1435).

Indeed, Powell stated that the "primary purpose" of this form of contract was to give Bethlehem's organization an "incentive" to make such increase of efficiency (R. 1369, 1340). Almost every other reference by Bethlehem's agents to the half-savings provision not only supports the view that to gain a bonus Bethlehem was required to increase efficiency or to reduce costs, but is consistent with no other interpretation (R. 1366–1369, 1379, 1436, 1438, 1449, 1641, but cf. 1446–1447). It was in this view presumably that Powell and Brown represented the estimates of base cost finally accepted as the "lowest prices which according to their best and mature judgment, would afford Bethlehem a reasonable opportunity to effect 'savings' as a result of its efforts and ability to increase efficiency of management and labor as compared with average

efficiency then existing" (R. 640). Piez' understanding of the "savings" clause was the same as that expressed in Powell's testimony (R. 1499).

On the basis of this evidence, the Master expressly found that it was understood that any substantial "savings" effected by Bethlehem with respect to respective costs of construction were supposed to result solely from an increase in the average efficiency of labor and management, and service of material, then existing (R. 636). While he denied findings which implied that the contract provision would operate only in the event of increased efficiency (R. 637–638), the Master had no doubt that this factor was the only reason for including the provision. He found that it was "understood that participation in 'savings' was supposed to represent a bonus or additional compensation to be earned by Bethlehem as consideration for its special efforts and ability to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing" (R. 638), and that "it was understood that Bethlehem had made such study of cost data available to it as would enable it to determine base prices which would afford it a reasonable opportunity of making a reasonable 'savings,' provided it was successful in its efforts to increase the efficiency of management and labor as compared with average efficiency then existing" (R. 639).

Bethlehem appears to contend that, since both parties intended the estimates of base cost to be "liberal," the contract should be construed to permit participation in "savings" regardless of how earned. The evidence and findings on which Bethlehem relies, however, show that the estimates were intended to be liberal in order to provide an "incentive for efficiency" and stimulate the shipbuilders to exercise their "ingenuity" and to their "very best" (R. 552, 684–685, 1499). Thus, the "liberal" character of the estimates, far from supporting Bethlehem's position, suggests the opposite conclusion.

3. *The Interpretation is Reasonable.*—In the court below, Bethlehem contended that if the contract were construed as the Government suggests, the "savings" clause would be provocative of disputes and that if the parties had intended such a construction, they would have included a definition or formula for determining the application of the intended standard (Br. pp. 21–22). The contention is plainly specious. The contracts fairly bristle with provisions even more likely to engender fundamental differences of construction. Thus the agreements required Bethlehem to use its "best efforts" to protect the Government's interests (R. 120). In the critical section XVII "actual cost" was defined to include "a proper proportion" of running expenses, interest, taxes, physical losses, and "a reasonable allowance for depreciation" (R.

116–117). The Fleet Corporation had the power to make "reasonable alterations" in the plans and specifications (Art. II, R. 111). Casualty insurance should be procured so far as available "at reasonable cost" (Art. IX, R. 111). "Adequate" accounts should be kept (Art. XVI, R. 115). The parties may have considered that any dispute as to the extent of Bethlehem's share in "savings," as well as disputes over other indefinite provisions, would be resolved by the arbitration provision of section XX (see, e. g., R. 2108) which applies in terms to any case in which the parties "fail to agree as to any matter contained in or connected with this contract, or if any doubt or dispute arises as to the meaning, construction or effect of this contract, or of any of the provisions or covenants hereof * * *." If so, the reason for omitting a precise definition in this and the other clauses mentioned is obvious.[11] But whether the subject was deemed a proper one for arbitration or not, it is clear that the generality of the obligation provides no reason for implying an intention not to create one.

Certainly it cannot seriously be suggested that proof of special efforts and the relation of such

[11] Neither party has relied on the arbitration provision as a defense to the respective actions, possibly because the General Manager of the Fleet Corporation was designated as arbiter in the contracts (R. 2108) and there was no such officer at the time this dispute arose.

efforts to increased efficiency is not feasible, and hence was not intended. The determination of increases or decreases in efficiency and their causes is a matter of common business experience and, particularly in the circumstances of this case, the parties could not have supposed that such a determination would involve any unusual difficulties. The relative simplicity of determining whether any increase of efficiency occurred is evidenced by the showing made by Bethlehem on the basis of the actual records of costs embodied in Ex. B 32. The cause of any increase of efficiency is likewise readily demonstrable. The estimates of cost included in the contracts made "liberal" allowances for increases in material, labor, and overhead costs by reason of definite though unpredictable contingencies owing to the war conditions, and the question whether the "savings" resulted from the nonoccurrence of these contingencies as distinguished from Bethlehem's special efforts is plainly susceptible of proof. There was no difficulty in this case in showing the methods adopted by Bethlehem prior to the execution of these agreements to recruit and train labor and increase its efficiency, and the testimony of Brown that the increase of labor efficiency resulted from restoration of peacetime conditions clearly shows that the cause of increased efficiency may readily be proved.

The Court of Claims has consistently permitted recovery under the bonus-for-savings provisions

only when the "savings" resulted from special efforts of the contractor (see *infra*, pp. 45–48). It has found no difficulty of proof under this view of the provisions. In *Cohen, Endel & Co.* v. *United States*, 60 C. Cls. 513, the court, after proof by the plaintiffs, made the following finding of fact (p. 516):

> The additional work and special care bestowed by the plaintiffs on the work called for by the contract consisted in acquiring a new plant and additional space; additional appliances at more expense; in the expenditure of additional time, effort, and money in executing the contract; in the employment of men, labor, and expense in the handling of and measuring the cloth; and in the increase in the pay roll of employees.
>
> The benefit derived by the United States from the execution of the supplemental contract was in the saving of material consumed in the manufacture of the garments—to be exact, the saving of 5.592 inches per coat; and thus more garments were manufactured from the materials furnished by the United States than would have been manufactured under the terms of the original contract.

And in its opinion the court pointed out that the plaintiffs "did additional work, gave special care, and incurred expense which they were not obliged to do under the original contract of June 29, 1917" (p. 519).

Similarly, in *F. Jacobson & Sons* v. *The United States*, 61 C. Cls. 420, the court found, after proof (p. 423):

> The methods adopted by plaintiffs resulted in a greater saving in Government materials than would have been made if these methods had not been adopted. They produced 13 shirts out of the material allotted to them for 12 shirts. To accomplish this it was necessary that plaintiffs have and maintain larger tables for cutting and more space for work, besides other economies in doing the work. These were maintained and at large additional expense to themselves arising out of increased rents, light, and heat for the additional space, cost of separating the material into shades and different widths whereby the cutting could be done more economically and less waste occur, and the employment of additional help the plaintiffs made saving of material.

We submit, therefore, that the bonus-for-savings provision should be reasonably construed to accord with the intention of the parties, to permit payment of the bonus only if there be a showing of special efforts by Bethlehem to increase its efficiency.[12] Since it made no such efforts in regard to

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[12] The respondent also suggests that the estimates of base cost were represented by Bethlehem as sufficient to provide a reasonable probability of earning 10% of estimated cost plus war and excess profits taxes. Powell testified, however, and the Master found, that taxes were not included in

these contracts, it cannot recover the additional bonus of $12,000,000 for their performance.

## III

### THE BONUS-FOR-SAVINGS PROVISION, CONSTRUED TO PERMIT BETHLEHEM TO SHARE IN "SAVINGS" HOWEVER CAUSED, IS VOID AND UNENFORCIBLE AS A SEPARATE AGREEMENT TO MAKE A GIFT OF GOVERNMENT MONEY

We have shown that the bonus-for-savings provision was intended by the parties to represent additional consideration only for special efforts by Bethlehem to increase its efficiency. If, however, that provision was intended to permit Bethlehem, without regard to how the "savings" were caused, to receive additional and riskless profits, equal to half of the amount by which estimated costs exceeded actual costs, it is void and unenforcible because the provision, so construed, operates to make a gift of Government property.

It is an elementary principle that public officers cannot give away the property of the Government, and that any contract to do so is void and unenforcible. *Bausch & Lomb Optical Co.* v. *United States*, 78 C. Cls. 584, 607, certiorari denied, 292

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the estimates (R. 1366, 640), and the fact that Bethlehem hoped to earn a profit large enough to leave it a 10-percent profit after taxes is not necessarily inconsistent with the testimony and findings that "liberal" estimates were intended to provide an incentive for efficiency. (See *infra*, pp. 59-60.)

U. S. 645; cf. *Vulcanite Portland Cement Co.* v. *United States*, 74 C. Cls. 692, 705; *Yale & Towne Mfg. Co.* v. *United States*, 67 C. Cls. 618, 625; *Littauer Bros.* v. *United States*, 63 C. Cls. 112, 120. That principle is fully applicable here.

1. *There Was No Consideration for the Provisions.*—The bonus-for-savings provision is construed by Bethlehem to import no additional performance on its part. It would, under this construction, plainly be an agreement to make a gift if it had been added to the original contract by supplementary agreement.[13] Bethlehem's argument, then, must be that the provision is enforcible simply because it was incorporated in the original contract rather than added by supplementary agreement. It contends, in other words, that the consideration moving to Bethlehem in exchange for the construction of the vessels was not only the cost plus fixed fee but the bonus-for-savings as well (Br. in Opp. p. 27). The contention is unsound.

As a general rule of contract law, it is doubtless true that Bethlehem's performance would consti-

[13] It is a familiar doctrine of contract law, peculiarly applicable to the Government, that supplemental agreements which promise additional compensation if the other party does no more than perform the original contract are void for want of consideration. *Wilcox* v. *United States*, 56 C. Cls. 224, 235; *Yale & Towne Mfg. Co.* v. *United States*, 67 C. Cls. 618, 625; *Vulcanite Portland Cement Co.* v. *United States*, 74 C. Cls. 692, 705; *Bausch & Lomb Optical Co.* v. *United States*, 78 C. Cls. 584, 607, certiorari denied, 292 U. S. 645.

tute technical consideration for payment under the original contract of the actual cost, a fixed fee of about 10 percent of the estimated costs, and also one-half of the "savings" below estimated costs. But that general rule is based upon the assumption that the additional compensation represented by the bonus-for-savings provision was in truth consideration for Bethlehem's performance. The facts in this case refute that assumption, and show that the bonus-for-savings provisions in these contracts were actually included without any corresponding consideration whatever on the part of Bethlehem.

The consideration for the bonus-for-savings was not the construction of the vessels but Bethlehem's special efforts resulting in increased efficiency. Both parties are agreed that the purpose of the bonus-for-saving clause was to provide an incentive to increased efficiency, and the Master found that at the time of the negotiations Bethlehem's participation in savings was understood to represent "additional compensation" to Bethlehem "as consideration for its special efforts and efforts to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing. (R. 638.) Bethlehem has not and cannot attack this finding here. Indeed, as we show below (*infra*, pp. 54–55), 10% was the normal compensation for construction of vessels under straight cost plus contracts obligating the contractor to give his best

efforts, a standard recognized and accepted by Bethlehem (R. 655). The sole question therefore is whether the bonus-for-savings clause, construed to permit Bethlehem to share in savings where the consideration bargained for has failed, is a valid agreement. The principle that a public officer cannot give away public property would seem plainly to require that the question be answered in the negative.

Moreover, for the purpose of showing that the compensation exacted for the vessels is not unconscionable, Bethlehem is forced to justify the bonus-for-savings provision, not on the ground that the construction of the vessels was the agreed exchange, but solely on the ground that it secures to the Government, beyond cost-plus contracts, the additional benefit of reducing costs because of the incentive to increase efficiency, and that the provisions produced the desired result. Otherwise, the bonus-for-savings provisions would be plainly unconscionable (see *infra*, pp. 75–85).

An undertaking by the Government to pay additional compensation which can be justified only by additional benefits to the Government must, as a matter of law, be supported by separate consideration. This is required not only by technical principles of contract law, but also by the principle of public policy which forbids Government officers to make a gift of public moneys. Where, as in this case, the sole justification for the Government's un-

dertaking to pay a bonus is a separate benefit to the Government, an undertaking in the original contract to pay such a bonus without this benefit, even though supported by technical consideration, is no less a conflict with this public policy than is a similar agreement in a supplemental contract.

2. *The Decisions.*—Such has long been the established doctrine of the Court of Claims with respect to the bonus-for-savings clause. In *J. J. Preis & Co.* v. *United States*, 58 C. Cls. 81, 86, the court held that the contractor could recover on a bonus-for-savings clause embodied in a supplemental agreement only to the extent that savings were made "as a result of its extra care under that contract."

In *Burke & James, Inc.* v. *United States*, 63 C. Cls. 36, the Court extended the doctrine to a case in which the plaintiff brought suit under a bonus-for-savings clause which had been incorporated in the original agreement; the Government had paid the actual costs, plus the fixed profit. No attempt was made to show that the savings were due to the plaintiff's extra care. In rejecting this demand, the Court of Claims said (p. 53):

> It was an adopted practice of officers of the Government during the stress of war-time needs to insert in some cost-plus contracts a bonus-for-savings clause. * * * Manifestly the purpose contemplated by agreeing to pay a bonus for saving was to put a premium upon economy in production and thus

> derive for the Government a real and substantial monetary benefit. In other words, the consideration for the undertaking was the benefit accruing to the Government by a reduction in the cost of materials below the contract allowance. * * *

After reviewing its previous decisions, the court continued (p. 55):

> It is neither an unjust nor an unfair deduction from the record to state that, eliminating the bonus-for-savings clause from the contract entirely, the cameras would have cost in materials exactly what they did cost. * * * No attempt was made to establish consideration for the savings clause, save an argument that it was an inseparable ingredient of the total price to be paid * * * and an insistence for the enforcement of the letter of the contract.

The court concluded (pp. 56–57):

> It is axiomatic * * * that a Government officer is without lawful authority to give away the rights of the Government. A clause in a Government contract without consideration is nonenforceable. * * * In the absence of express authority so to do, a Government officer may not pay gratuities for the performance of contractual duties which, under the very terms of the contract, the contractor is obligated to perform.

The court, therefore, held that the promise to pay a percentage of savings was severable from the

stipulation to pay cost and the fixed fee, both as to consideration and as to performance, and that the failure to prove increased efficiency, savings in the use of materials, or other benefit to the Government because of some extraordinary effort, which would not have been made but for the bonus-for-savings clause, barred recovery (pp. 57–58). In *Cohen, Endel & Co.* v. *United States*, 60 C. Cls. 513, *F. Jacobson & Sons* v. *The United States*, 61 C. Cls. 420, and *Kling Bros. & Co., Inc.* v. *United States*, 89 C. Cls. 329, the same principles were announced.

*Dayton Airplane Co.* v. *United States*, 21 F. (2d) 673, 682–683 (C. C. A., 6th) is not to the contrary. No claim seems to have been made there that the contractor had not effected any savings; the court decided only that the clauses were not *per se* opposed to public policy, and in stressing the purpose of the provision to keep down costs, the court seems to agree with the views we maintain. Similarly, in *Wells* v. *Carlisle Tire Corp.*, 98 Conn. 657, the only nongovernmental case involving a bonus-for-savings clause which we have found, there was no claim that the savings were fortuitious; nevertheless the language of the opinion is apt (pp. 663–664):

> The "savings clause" was inserted in order to furnish the contractor with a motive to keep the cost of the work as near to his estimate as possible; if by his fidelity, competency, energy and diligence he saved the

owner from paying this maximum price, he would receive one fourth of the saving. The purpose of the savings clause was to effect a real saving to the defendant by giving the contractor a part of what he saved below a fixed amount.

The decisions of the Court of Claims seem obviously sound; they weld together accepted principles of contract law and public policy, to produce a rule which assures freedom to the contracting officers, justice to the contractor, and protection to the Government against flagrant impositions by contractors determined to capitalize upon a national emergency.

3. *There is No Valid Objection to the Rule.*—The only reason which respondent has hitherto advanced to discredit the Court of Claims doctrine is that proof of such an increase in efficiency due to special efforts would be difficult and that the bonus-for-savings clause is of such great advantage as to require that it be upheld even where proof that it resulted in savings is dispensed with. Whatever may be said in support of this view in normal times, when estimates can reasonably be made, as Powell testified, with a variation of only 5 percent above or below a mean (R. 1341), it is wholly indefensible where estimates include large allowances for well-defined but very uncertain contingencies arising out of the war. See Uniform Contracts and Cost Accounting Definitions and Methods; Recommen-

dations by Interdepartmental Conference, July 1917 (Govt. Printing Office), pp. 5–6.

Powell, Bethlehem's witness, explained in detail that, in the circumstances of these contracts, estimates could reasonably vary 75 percent, because of inability to predict or control costs in wartime (R. 1348–1350). As Powell testified, "There was no such thing as an accurate estimate for a ship under the conditions as they existed at that time" (R. 1349). The Master accepted this view in concluding that any estimate of probable future cost was a matter of "educated guessing" (R. 624, 619), and it was undoubtedly on this understanding that the Master found Brown's estimates, which formed the basis of the contracts, to be reasonable (R. 688) and to be "as accurate as might be expected under the uncertain conditions prevailing at the time" (R. 683).

Because of the conditions under which they were made, Brown's estimates included specific substantial allowances for increase in labor, material, and overhead costs which might occur by reason of well-recognized contingencies (*supra*, p. 7). It was accordingly an easy matter for Brown to show that the increase in efficiency of labor all occurred after and was due to the restoration of peace-time conditions. (See *supra*, p. 27.) Proof of an increase of efficiency or lack of it likewise required no more than a consideration of the actual cost analysis relied on by Bethlehem (Ex. B 32). (See *supra*, pp. 25–27.)

The same is true as to a showing that special efforts were made. It might perhaps be difficult to make a minute break-down of the precise savings accomplished in each cost category as a result of special efforts to increase efficiency. But there would be no unusual difficulty in making a reasonable estimate of their contribution to any savings below the estimated cost, and none whatever in determining whether or not there were savings, of some amount or other, which resulted from the contractor's efforts to increase efficiency (cf. R. 607–609). This is abundantly proved by the Court of Claims cases, discussed above (pp. 40–41, 45–48), where just such proof has been made.

Here, as we have shown (*supra*, pp. 23–30), Bethlehem has made no showing that the "savings" resulted in any manner from its own efforts to increase efficiency. If the bonus-for-savings provision, then, were construed as offering to Bethlehem this tremendous increment to its riskless profits, it is void and unenforcible, as an attempt to make a gift of Government money.

## IV

### THE BONUS-FOR-SAVINGS PROVISIONS SO CONSTRUED ARE VOID AND UNENFORCIBLE BECAUSE OF THE CIRCUMSTANCES UNDER WHICH THEY WERE NEGOTIATED AND BECAUSE THEY PERMIT BETHLEHEM INORDINATE PROFITS

If the bonus-for-savings provisions of the contracts are construed to entitle Bethlehem to share

in the "savings" however caused, they are void and unenforcible for the further reasons that they were exacted through circumstances amounting to duress and that they are unconscionable because offering Bethlehem inordinate profits. In the course of each argument, it may be material that Bethlehem's contract terms were excessive under the practice obtaining in the market at the time of execution. We shall, therefore, develop this preliminary inquiry before discussing in detail the legal issues and their consequences.

A. THE BONUS-FOR-SAVINGS PROVISIONS SO CONSTRUED PERMIT INORDINATE PROFITS WHICH WERE CONTEMPLATED AT THE TIME OF EXECUTION

1. *The Profits are Inordinate.*—The fixed fees to which Bethlehem was entitled under the contracts set the lower limit of its profits at $11,962,400, or about 12.9 percent of actual base costs, and about 10.9 percent of actual costs, including wage increases and extra work. The bonus-for-savings provisions open wide opportunity for further gain, and if respondent's claims are sanctioned by this Court, their profits will total about 26 percent of the actual base cost of the ships, and over 22 percent of the actual costs, including extra work. These additional profits, under Bethlehem's contentions, would be realized without any corresponding effort or consideration from Bethlehem other than that due under an ordinary cost-plus contract.

Little need be added to the concurrent findings of the courts below to prove that in the circum-

stances of these transactions the profits were inordinate. The District Court thought that Bethlehem's actions constituted "daylight robbery"; it found an analogy in "the famous Rob Roy distinction who admitted he was a robber but proudly proclaimed that he was no thief" (R. 738). In view of the Circuit Court of Appeals, Bethlehem's insistence upon the extraordinary margin of profit it obtained indicated "an attitude of commercial greed but little diluted with patriotic feeling" (R. 2327); the court observed that "it can hardly be denied that Bethlehem took advantage of the war emergency to drive a hard bargain," and that "Bethlehem may be condemned for having taken advantage of the Nation's necessities to secure inordinate profits" (R. 2328). The Master justified (R. 540–541) the enforcement of such a "hard bargain" upon the ground that—

> It is a matter of conscience how much one takes from those needing service in necessity. It is a matter of honor to pay for such service at the contract price, even though, when the necessity be over, the obligor may regard the weight of his debt unduly burdensome.

The conclusions of the courts below are plainly supported by the evidence in this record and by the accepted practices of wartime contracting.

It cannot be doubted, if the contracts had been entered into on the basis of cost plus a fee measured by a percentage of actual cost, or a fixed per-

centage of an estimated cost, that 10% of actual or estimated cost would constitute the maximum recovery. Such was the usual standard in straight cost-plus contracts at the time these contracts were executed. This was the maximum established by the Navy Department in such cost-plus contracts,[14] and the War Department and other branches of the Government observed the same or even stricter standards.[15] The master took judicial notice of some official reports of armament contracts (R. 546–551) but apparently ignored these primary sources of contracting policy.

Such was the standard enforced by the Fleet Corporation and recognized by Bethlehem itself. In the case of contract No. 182 for the construction of troop ships, executed on the basis of cost plus a percentage of the actual cost, Bethlehem originally demanded 15%, but this offer was rejected by the Fleet Corporation and the fee was fixed at 10%, without any allowance for taxes (R. 655). Indeed, Mr. Schwab, as Director-General of the Fleet Corporation, forced another shipbuilding concern to

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[14] Annual Report of the Secretary of the Navy, fiscal year 1917, H. Doc. No. 618, 65th Cong., 2d Sess., p. 33; *id.* 1919, H. Doc. No. 729, 66th Cong., 2d Sess., pp. 572–576; *id.* 1920, H. Doc. No. 994, 66th Cong., 3d Sess., pp. 147–148.

[15] Annual Report of the Secretary of War, fiscal year 1917, H. Doc. No. 856, 65th Cong., 2d Sess., p. 18; War Department Annual Reports, fiscal year 1919, H. Doc. No. 426, 66th Cong., 2d Sess., pp. 4138–4151; Crowell, *Government War Contracts* (1920), pp. 75, 84–85, 88, 149, 210–212, 217–218, 225, 268–269.

modify existing contracts so that no profit of more than 10 percent could be earned (R. 660–662); this, he hoped, would "prove an object lesson to any other contractors who think that they can take advantage of us to obtain excessive prices for ships" (R. 662).[16]

The respondent and the court below (R. 2329) emphasize the statement of the Master (R. 540) that "Bethlehem was an old-line shipbuilding company, carrying the burdens of idle invested capital over long-time periods, the maintenance of an experienced and expensive organization, which, during periods of inactivity in the shipbuilding indus-

[16] The Master declined to make a finding that 10% of "actual" cost was regarded as reasonable compensation for Fleet Corporation "cost-plus" contracts "when so broadly stated" (R. 662–663), but his comment indicates that, as in the case of many other requested findings, he excepted to the inaccuracy of certain language and gives no indication that he would have rejected the request if "estimated" had been substituted for "actual." Certainly, there is no evidence which would support a different finding. Piez testified, it is true, that the Fleet Corporation had no general policy to limit contractors to 10% of "cost" (R. 1515), but his statement obviously had reference to all classes of contracts, including those with a bonus-for-savings clause, and was not limited to straight cost-plus agreements. The Master took judicial notice of the reports of congressional committees (R. 546–551), but failed to consider the evidence of the practice of the Navy, War, and other Departments cited above. The respondent places some reliance on the extent of profits earned by other corporations during the war and in peacetime, but makes no effort either to distinguish government contracts or lump-sum agreements in which the contractor assumed a large risk (Exhs. B-10, 11, R. 1906–1907).

try, probably was not productive of overhead, such as maintenance, taxes and other carrying charges," but which were "incident to the stand-by service rendered by Bethlehem." The correlative suggestion, that a fixed fee of 10 percent was insufficient, is unfounded. No such distinction, so far as we have been able to discover, was recognized in government cost-plus contracts. Moreover, the suggestion has no basis in the facts of Bethlehem's own experience. Bethlehem's witness, Geiss, testified that prior to the war-time building program, Bethlehem maintained a plant sufficient for normal peacetime demands (R. 1563), that starting in 1915 and 1916, Bethlehem made large additional capital expenditures because it "hoped to make many millions out of our shipyards in securing contracts from foreign countries" (R. 1559), and that the expenditures made by Bethlehem in 1917 and 1918 were partially in completion of the 1915 and 1916 program (R. 1559). The amount invested by Bethlehem for performance of the contracts in issue here was only a small fraction of the capital contributed by the Fleet Corporation for this purpose (R. 1558, 1594–1595).[17]

[17] The Fleet Corporation contributed $4,825,415 for plant expansion (R. 1558), while Bethlehem contributed $627,000 beyond completion of its 1915–1916 program (R. 1558–1559, 1593). The improvements, to be the property of the Fleet Corporation subject to purchase by Bethlehem (R. 412–415) were transferred to Bethlehem without cost as a part of miscellaneous settlements in this case (R. 1722).

Indeed, there can be no question in this case that, apart from any reward for savings, Bethlehem is entitled to only 10% of estimated costs, since the only justification which has ever been advanced for the bonus-for-savings clause is its alleged value as an incentive for efficiency (*supra*, pp. 34–36). The parties may thus be taken to have agreed that the fair compensation for ordinary construction under cost-plus terms is no more than 10% of the estimated cost.

Whatever might be said of a contract allowing a fee varying a small percentage from this standard, we assert, without fear of contradiction, that a wartime contract expressly providing for a risk-less fee of 20 or 25 percent of actual or estimated cost, would be recognized as inordinate in a straight cost-plus contract. Such a difference from the norm is not one of degree but of kind. A fee twice or more the usual amount involves such a marked departure from the usual practice that it is compelling evidence of extortion on the sole basis of the prevailing standards of the market place. We do not understand Bethlehem to make any contention to the contrary. The bonus-for-savings contracts as construed by Bethlehem stand on the same footing.

2. *The Profits Permitted by the Bonus-for-Savings Provisions Were Unreasonable at the Time of Execution.*—Bethlehem's position, as we understand it, is that the reasonableness of the contracts must be judged as of the time they were executed,

that so viewed the profits permitted by the contracts were not unreasonable, and that payment according to their terms therefore cannot now be deemed inordinate. Relying on the Master's findings, Bethlehem contends that the bonus-for-savings form of contract "was a desirable one from the standpoint of both parties" and preferable to a straight cost-plus agreement because of its incentive for efficiency, that the estimates of base cost in the contracts were reasonable estimates of reasonable cost and were "liberal" in order to provide the contractor an incentive to cut under them as both parties understood, and that the contracts were productive of the results intended because the total cost to the Government was less than that paid to other shipbuilders under lump-sum and cost-plus contracts (Brief in Opposition, pp. 19–21).

The argument is without substance. As previously pointed out (*supra*, p. 50), the Master's finding that the estimates of base cost in the contracts were reasonable was based on the evidence that it was impossible to make an accurate estimate under the then prevailing conditions and that reasonable men might therefore differ in their estimates as much as 75 percent. Because the factors affecting cost were unpredictable it was within the contemplation of the parties that the actual cost might fall far below estimated cost by reason of the non-occurrence of the numerous and large cost increases assumed in making the estimates (see *supra*, p. 7; R. 1445–1447). The contracts, as construed by

Bethlehem, were thus deliberately designed to give Bethlehem in that event an enormous profit without any increase in efficiency due to its efforts and even though its performance would differ in no way from what it would have been obligated to render under a straight cost-plus contract with a fee of only 10 percent of actual or estimated cost. In these circumstances it can make no difference whether the profits actually earned were fixed at that amount in the contract or are the result of subsequent contingencies within the contemplation of the parties and due to events in no way related to the alleged incentive.

In this connection it is significant that the estimates when made were such as to offer a "reasonable probability" of a net earning of 10 percent "after paying all War and Excess Profit taxes" (R. 1808, 1377–1379, 1438–1441), which taxes then amounted to about 60 percent (R. 1365), or a profit of approximately $30,000,000. Indeed, Bethlehem now points to this contemporaneous representation as conclusive evidence that the profits now claimed were within the contemplation of the parties from the beginning without any requirement of a showing of increase of efficiency by reason of its own efforts. It is unnecessary to labor the point that Bethlehem's position is striking confirmation of our claim of unconscionability. It insisted, in other words, upon contracts which, involving no risk, would probably result in profits sufficiently large to leave it $12,000,000 untouched by the taxation which the rest

of the country bore as its contribution to the prosecution of the war. In seeking to show that the bonus-for-savings provisions required no showing of an increase in efficiency, Bethlehem succeeds only in demonstrating that, if it is right, the contracts were unconscionable at the time of their execution. For Bethlehem at that time expected, and is now claiming, more than twice the normal compensation for a performance which it would have been obligated to render on a straight cost-plus contract.

3. *Prices Paid Other Shipbuilders.*—In order to give some semblance of plausibility to its position, Bethlehem contends that the profits permitted by the bonus-for-sav ..gs provisions are not unreasonable because it now appears that the cost to the Government of the vessels constructed by Bethlehem was less than the price which the Fleet Corporation paid to other shipbuilders for vessels built under lump-sum and straight plus contracts. Since the cost of the vessels constructed by Bethlehem would have been the same if the contracts had contained no bonus-for-savings clause (R. 678), it is obvious that the comparison invoked provides no justification for compensation of more than twice the accepted standard for the services which Bethlehem contracted to and actually did render.

Under normal conditions, the prevailing prices paid other shipbuilders might well be a fair measure of the value of Bethlehem's services. In a free market the operation of the ordinary forces of sup-

ply and demand would presumably work to exclude high-cost shipbuilders and the prevailing prices would, therefore, constitute a fair measure of value. But in war-time this assumption is completely without foundation. The Government's demand is unlimited and cannot be qualified by considerations of price. The Government needs the services of the highest cost producers as well as those of the efficient. Marginal or sub-marginal producers who could not possibly find a demand for their services in normal conditions must be employed by the Government for their services without consideration of cost. In these circumstances, the cost of others cannot possibly be accepted as a measure of the fair value of the normally efficient producer. In fact, this was plainly recognized in all the war-time contracts made on a cost basis, the parties agreeing that compensation should be based on the contractor's costs, not on the costs of others or on "prevailing" prices determined by the costs of others.

In the second place, the comparison with other prices is wholly misleading in point of fact. The Master's findings (R. 554, 568), on which respondent relies, were based on Exhs. B3 and B4 and the testimony of Brown who prepared or was familiar with them (R. 1094–1125, 1136–1140). Even if it be assumed that the shipbuilding experience of the other contractors was comparable to

that of Bethlehem, Exhibit B3 shows that most of the vessels which Brown considered were built under lump-sum contracts in which the contractor took the risk of loss, and that only a small proportion were constructed on a cost-plus basis.[18] It is obvious that lump-sum contracts in which the contractor assumes the risk of a rise in costs cannot be compared with one in which the contractor took no risk at all. Brown made no comparison between the cost of the vessels constructed by Bethlehem and those constructed under cost-plus contracts, but averaged the cost of all vessels of a class comparable to a class constructed by Bethlehem (R. 1114). In addition, he admitted that individual comparisons were feasible only in the case of two of all of the vessels, and made no effort to exclude capital contributions to other builders, as he did for Bethlehem. (R. 1105, 1096–1104, 1109).

In determining the amounts of profits which can lawfully be exacted from the Government in wartime contracts, regard should be had to the extent of the risk assumed by the contractor and the necessities of the Government. In our system, profits, as the courts have recognized, are a reward for the assumption of risk. *Cf. Rishel* v. *Pacific Mutual Life Ins. Co.*, 78 F. (2d) 881 (C. C. A. 10);

[18] Exhibit B3 sets out the cost of shipbuilding to the Government during the war period, on work undertaken by contractors other than Bethlehem. Only 17 of the contracts were cost-plus contracts, while 76 were undertaken for a contract price and presumably were of the lump-sum type.

*Dingler* v. *Ritzius,* 42 Idaho 614; *Burmeister* v. *Hamann,* 208 Iowa 412; *Yankey* v. *Clark,* 224 Ky. 346. Contractors accepting a fixed price under lump-sum agreements should accordingly be entitled to a greater percentage of profit than those who, like Bethlehem, take no risk of loss whatever.

Under any view, then, Bethlehem has secured inordinate profits, which at the time of execution of the contracts, were within their contemplation.

B. THE AGREEMENT WAS EXACTED THROUGH DURESS

Under these circumstances, the bonus-for-savings provisions of the contracts are void and unenforcible. The first reason is based upon the circumstances under which Bethlehem exacted them. The Fleet Corporation, we shall show, had no choice but to accept whatever terms Bethlehem insisted upon, however harsh they might be, and in fact accepted them only because it had no alternative. Such an agreement between private individuals would be condemned on familiar principles of duress. But, if such be necessary, the courts should establish stricter rules than those applicable to a free market place in enforcing the contracts which the Government, without alternative choice, has been forced to make during a grave national emergency.

1. *There Was Duress in Fact.*—The war emergency of 1917 and 1918 demanded the speedy construction of as many vessels as was possible, both

for the transportation of troops and for the carriage of needed supplies (R. 539, 574–575, 1362). The full use of the facilities of Bethlehem, the largest shipbuilding concern in the world, was vital to this phase of the prosecution of the war; and, although theoretically empowered to commandeer these facilities, the Government, as the Master found, was actually faced with the practical alternative of securing an agreement from Bethlehem to construct the ships, or of doing without them (R. 539). Moreover, in the words of the chief representative of the Fleet Corporation, "There was no time for haggling" (R. 1520). Of this national emergency, of the urgent needs of the Fleet Corporation, and of Bethlehem's indispensability, respondents' agents were well aware (R. 575, 1035).

In these circumstances, Bethlehem's attitude was one of "commercial greed but little diluted with patriotic feeling" (R. 2327). It insisted adamantly upon the half-savings type of contract, and would take no other (R. 627, 642–3, 738, 1188, 1355, 1425). Its agents determined, in advance of the final negotiations, not to go below the figures of estimated cost prepared by its own agent, Brown (R. 528, 642, 1090, 1377). Faced with such iron demands, the representatives of the Fleet Corporation were, in the words of the Special Master, "obliged to take the contracts" on the basis proposed, "although resenting the commercial atti-

tude of Bethlehem and condemning Bethlehem for demanding its 'pound of flesh' " (R. 539).[19]

[19] Respondents attempt to deny the harshness of the alternatives presented to the Government by referring (Brief In. Opp. p. 20, fn) to a letter of January 3, 1918, sent by Bethlehem to Mr. Charles Piez, Vice-President and General Manager of the Fleet Corporation, stating that Bethlehem was prepared "to accept the order * * * on such terms as may be personally determined by Mr. Charles Piez * * *." The Special Master, the District Court, and the Circuit Court of Appeals, however, agreed, upon all the evidence, that the Government had no real freedom to reject Bethlehem's terms (R. 538–539, 738, 741, 2328).

No other view is permissible on the record. Powell's testimony makes it very clear that the purported offer was not an agreement to submit to any arbitrary price which might be set but contemplated only a genuine judgment based on his own study and judgment (R. 1362, 1407–1408). And from Powell's testimony, it is equally clear that Piez could obtain no facts on which to base a judgment save, as Powell stated, such facts as were submitted to him by Bowles and Powell and the prices "other people" were charging (R. 1408). The Fleet Corporation representatives had no knowledge of Bethlehem's costs and never submitted estimates of their own (R. 644). Indeed, Piez was accustomed to rely on the judgment of Powell, with whom he was "very close," in shipbuilding matters (R. 646). It will be recalled that the break-down submitted by Bethlehem in support of its estimates was merely "an arbitrary division of the total cost estimate" (R. 641), which could not have aided Piez in arriving at any judgment, and the prices paid under the few other contracts with other shipbuilders were no measure of the reasonableness of Bethlehem's costs. See *supra*, pp. 60–63. Moreover, as Powell well knew (R. 1405) Piez was appointed General Manager of the Fleet Corporation only a few weeks before the negotiations of these agreements (R. 1405, 1495), and had had no prior experience in the shipbuilding business (R. 527, 646). It was therefore impossible for Piez to make an independent determination of the

The subsequent contracts, negotiated shortly after those which were awarded on January 5, it should be noted, were imposed upon the Fleet Corporation under precisely the same compelling circumstances. Neither the Master nor the Courts below made any distinction between the earlier and later contracts in their findings of compulsion (R. 538–539, 738, 741, 2328).

The facts of the record and the findings of the Master and both courts below abundantly demonstrate that Bethlehem was in a position where it could exact whatever price it chose. The Fleet Corporation, faced by the overriding necessity of obtaining ships, could not refuse to enter into the contracts, however exorbitant Bethlehem's demands might be.

This, the Court will note, is a situation quite different from that of the private concern which seeks the construction of ships, or the performance of other business contracts. There the need for the ships is purely economic; if the contractor demands too much, the owner will have no desire for the ships, for his opportunities of profit will vanish as the cost of the ships goes up. There is then, an automatic limit to the price upon which the contractor can insist; and a real choice in the owner to refuse to enter into the contract. But when the life of the

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reasonableness of Bethlehem's estimates of cost. In fact, Piez awarded the first seven contracts on January 5, the same date on which Bowles and Radford made their recommendation to accept Bethlehem's proposals (R. 1920–1925).

nation is at stake the Government officials charged with the responsibility of securing necessary ships and material cannot refuse to enter into contracts simply because the demands are unreasonably high. The analogy, then, is not with a private concern faced with price demands which are unreasonably high, but with a private person faced by circumstances which in fact make refusal impossible. In such cases, as in this, the other party to the contract has an unqualified power to exact such terms as he chooses. If he uses this power to take advantage of the necessities of the helpless party, it would be a travesty upon justice to apply to this transaction the ordinary rules of contract law, which assume the existence of a free market in which both buyer and seller have freedom to refuse. For this reason, the common law has long recognized that the principles of contract law have only a limited application in case of duress, such as that shown in the execution of the contracts now in question.

2. *The Resulting Contracts Are Enforcible According to Their Justice and not Their Terms.*—The courts are not required to enforce contracts executed under such conditions regardless of their terms. It is true that the Anglo-American law of private contracts, unlike the civil law (see Dawson, *Economic Duress and the Fair Exchange In French and German Law* (1937), 11 Tulane L. Rev. 345) does not often find duress in a purely economic

compulsion to accept stringent terms. 5 Williston, *Contracts*, § 1608. But even here the courts have frequently refused to enforce agreements entered into only because of the necessities created by a grave emergency.

While mere vexation and annoyance or force of circumstances do not ordinarily constitute duress (5 Williston, *Contracts*, § 1608; cf. *Silliman* v. *United States*, 101 U. S. 465; *French* v. *Shoemaker*, 14 Wall. 314; *United States, Lyon, et al.* v. *Huckabee*, 16 Wall. 414) "it seems clear that if such circumstances were known and advantage taken of them by the other party a degree of pressure which would not ordinarily amount to duress, might have such coercive effect as to invalidate the transaction." 5 Williston, *Contracts*, § 1608. The "moral compulsion" (*The Elfrida*, 172 U. S. 186, at 197) resulting from a calamity or grave emergency has often been held to constitute legal duress.

While courts of admiralty have enforced contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain, "they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." *Post* v. *Jones*, 19 How. 150, 160; *The Tornado*, 109 U. S. 110, 117; *The Elfrida*, 172 U. S. 186, 193–194, 197. As this Court said in *Post* v. *Jones*, *supra*, in set-

ting aside an unequal sale of the cargo of a vessel stranded thousands of miles from port to the owners of nearby vessels in the same fishing fleet (p. 159):

> The contrivance of an auction sale, under such circumstances, where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract.

In such circumstances this Court has recognized that the usual standards of duress are inapplicable and that "in passing upon the question of compulsion the fact that the contract was made at sea, or under circumstances demanding immediate action, is an important consideration." (*The Elfrida*, 172 U. S. at 197). Cf. *Magnolia Petroleum Co.* v. *National Oil Transport Co.*, 281 *Fed.* 336, 339, 344, modified, 286 Fed. 40, 42 (C. C. A. 5). On like principle it has been held that a lease executed by a tenant at will, doubling the rent during a period of housing shortage, could be set aside for duress where the tenant agreed to the increased rental only because of the landlord's threat of eviction during the tenant's illness. *Sylvan Mtge. Co.* v. *Stadler*, 113 Misc. 659; Restatement of Contracts, sec. 493, Illus. 16.

These examples are but specific instances of a more pervasive rule of general contract law that duress exists whenever the consequences of resisting economic pressure to accept an unequal agreement would be catastrophic to the individual and injurious to social interests deserving of protection. The rule should be enforced with redoubled solicitude in the case of contracts entered into by the Government under the compulsion of an overriding national emergency.

The contracts with Bethlehem were urgently necessary because the ships were required for the the successful conduct of the war. Upon the outcome hung the security and welfare of the whole country. It would have been impossible to forego Bethlehem's facilities and organization, and Bethlehem did not hesitate to take full advantage of its position. Certainly, no court would countenance an agreement by a drowning man to give an exhorbitant sum to one bargaining over the rescue. Even more clearly the courts should not require the nation to accede to exorbitant demands or go without the necessary instruments of defense.

The contracts should, therefore, be invalidated because of duress even though it be assumed that Bethlehem was legally and equitably entitled to refuse to serve the Government save on its own terms. Bethlehem, however, enjoyed no such freedom. The Emergency Shipping Fund Act of June 15, 1917, c. 29, 40 Stat. 182–184, expressly author-

izes the President to place orders with any person for "such ships or materials as the necessities of the Government, to be determined by the President, may require during the period of the war, and which are of the nature, kind, and quantity usually produced or capable of being produced by such person," made compliance with such orders obligatory, and provided that in the case of a refusal to comply "at such reasonable price as shall be determined by the President," the President could take possession of such persons, plants, and materials. The duty to accept any order for ships was obligatory in terms and while the duty to accept at such "reasonable price" was not made so in express terms, such is the plain implication of the statute. But compare R. 597–598. The President, pursuant to the statute, delegated his authority to the Fleet Corporation (R. 1943–1946; *Emergency Legislation*, G. P. O., 1918, pp. 173–174). In these circumstances, if Bethlehem had refused to accept an order of the Fleet Corporation at the usual reasonable fee, and had insisted on a bonus-for-savings clause as additional compensation for providing the identical service as under a straight cost-plus basis, it cannot be doubted that any contract executed with Bethlehem because of the inadequacy of the alternative of condemnation could be set aside for duress. It is settled that where a public utility, obligated by statute or contract to serve at stated or reasonable and nondiscriminatory rates, exacts

additional compensation under an agreement obtained by a threat of cutting off an essential service, the agreement may be set aside and any excessive payment recovered. *City of Chicago* v. *N. W. Mutual Ins. Co.*, 218 Ill. 40, 43; *Chicago and Alton R. R. Co.* v. *C., V. & W. Co.*, 79 Ill. 121, 130; *Mobile & Montgomery Ry. Co.* v. *Steiner, McGehee & Co.*, 61 Ala. 559, 595; *Panton* v. *Duluth Gas & Water Co.*, 50 Minn. 175; *Westlake & Button* v. *City of St. Louis*, 77 Mo. 47; *Gess* v. *Nampa & Meridian Irrig. Dist.*, 38 Idaho 189; 5 Williston *Contracts*, §§ 1606–1607, 1618. In such cases, all the courts agree, judicial proceedings to compel performance of the duty are inadequate because the need for the service is immediate. In this case, the remedy of condemnation, as the Master and the courts below found, was inadequate because Bethlehem's organization was essential to the success of the shipbuilding program. And it is immaterial that the Fleet Corporation did not formally command Bethlehem to construct ships at reasonable prices. Bethlehem had given anticipatory notice that it would refuse to serve except on its own harsh terms. The Fleet Corporation's only remedy, as the Master and the courts below found, was condemnation, and this was inadequate.

There are thus strong reasons of public policy to prevent enforcement of contracts exacted by trading on the extraordinary necessities of the Government in time of war. This policy has been given explicit recognition since at least the time

of the Revolutionary War.[20] A similar policy has found expression in the taxation of excess profits during war-time, and in such measures as the various acts (C. 95, 48 Stat. 505, C. 812, 49 Stat. 1926, C. 35, 53 Stat. 560) limiting profits on sales of naval vessels and war planes to the Government, even during peacetime.

It follows, then, that the private law doctrine of duress is itself sufficient to show that contracts such

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[20] See the Resolution of December 27, 1776, of the Continental Congress conferring plenary powers upon Washington, and giving him authority, *inter alia*, "to take, wherever he may be, whatever he may want for the use of the army, if the inhabitants will not sell it, allowing a reasonable price for the same" (4 Jour. Cont. Cong., p. 1045); and the Resolution of November 30, 1778, providing as follows:

"*Resolved*, That in all cases where forage is wanted for the troops, and cannot be purchased by the commissaries at reasonable rates, application be made to the executive or legislative authority of the State wherein the forage is required, or to some person or person properly authorized by them for that purpose, for their interposition and assistance in procuring the necessary supplies:

"That it be recommended to the governments of the states, wherein the army or any detachment or part thereof now is, or hereafter shall be, to take such measures, in aid of the forage masters, who shall first use every endeavour to purchase the same, for the procuring sufficient quantities of forage, at reasonable rates, as shall, in their opinion, be effectual, and most likely to procure a speedy supply, (12 Jour. Cont. Cong., p. 1117.)"

See also *e. g.* Laws of Connecticut, 1778, p. 503, 507; Laws of Connecticut, 1779, p. 511; Laws of Maryland, 1777, ch. IV. These resolutions and statutes are reprinted in the volume of *Emergency Legislation* published by the Government Printing Office in 1918, pp. 207, 223, 241–4, 299.

as those which Bethlehem exacted are void and unenforcible because secured by duress, and that major reasons of public policy would in any event require the same result here, where the bonus-for-savings provisions were exacted by the force of the national emergency.

3. *Bethlehem Can Recover Only Its Fixed Fee.* Since the contracts were exacted by duress, then, they must be enforced according to their justice, and not according to their terms. It is settled that *quantum meruit* is the measure of recovery where a contract is set aside for duress, fraud, or illegality. *Crocker* v. *United States,* 240 U. S. 74, 81; *Clark* v. *United States,* 95 U. S. 539, 542–543; *Hume* v. *United States,* 132 U. S. 406; cf. *Pan American Co.* v. *United States,* 273 U. S. 456, 505–506.

The profits which accrue to Bethlehem under its fixed fee, amounting to over 10 percent of the actual cost, are a liberal allowance in *quantum meruit* and represent the maximum profit which was ordinarily paid under wartime contracts involving no risk of loss or special efforts (see *supra,* pp. 54–56, 60–63).

The respondent has suggested that the courts cannot be called upon to fix the measure of recovery permissible on war-time contracts. But the courts, of course, are constantly required to fix the value of services where the letter of the contract must be disregarded because of duress or other reasons, and

where the contract must, therefore, be enforced according to its justice. The conclusive answer, however, is that the measure of recovery on a cost-plus basis alone has been fixed by the practice in the market place and the courts are not required to substitute their own judgment for that of the business community.

In order, therefore, to receive payment beyond its fixed profit, Bethlehem must prove that it rendered some service, the value of which is reasonably measured by the compensation claimed. This, we submit, Bethlehem has not proved and cannot prove. As we have shown under Point I, the difference between the estimated and actual cost of the vessels was not due to any increase of efficiency brought about by Bethlehem's efforts. The only increase of efficiency shown was in labor costs and this increase occurred after and was due to the restoration of peace. In short, the performance which the Government received was no different from that to which it was entitled under a cost-plus contract without an additional bonus for "savings," and the Master so found (R. 678).

C. THE CONTRACTS ARE UNCONSCIONABLE

If the bonus-for-savings provision is construed to permit Bethlehem to participate in "savings," no matter how caused, it is unenforcible in this case for the further reason that it operates to confer

inordinate profits upon Bethlehem as an unconscionable reward, not for efficient service but instead for its ruthless bargaining with a purchaser unable to refuse.

It needs no argument to show that the profits which Bethlehem claims are staggering in amount (*supra*, pp. 13, 52–53). It should be emphasized, however, that our claim does not rest simply upon the fact that Bethlehem under the bonus-for-savings provision would receive unduly large profits. We have no doubt that the transactions of the commercial world and the history of government contracting each contain many examples of equally profitable contracts. But we do insist that riskless profits of more than 22 percent are unconscionable when they are secured through a bald refusal to perform services indispensable to the nation unless there be held open the opportunity for profits more than twice the normal profits for similar services. In other words, even if Bethlehem's exploitation of its country's need should not amount to technical duress, it is a factor which must be given full weight in the inquiry as to whether the contracts are unconscionable through giving inordinate profits.

We have shown that Bethlehem, trading upon the Government's necessities, exacted contracts which through their bonus-for-savings provisions produced inordinate profits. It is clear enough that in these circumstances the bonus-for-savings provisions are unenforcible.

1. The courts have long refused, whether at law or in equity, to enforce contracts found to be unconscionable, even in the absence of fraud. *Scott* v. *United States,* 12 Wall. 443, 445; *Hume* v. *United States,* 132 U. S. 406; *Burke & James, Inc.* v. *United States,* 63 C. Cls. 36; *Stiefler* v. *McCullough,* 97 Ind. App. 123. In the leading case in the United States, *Hume* v. *United States, supra,* the plaintiff agreed in writing to sell to the Government some shucks at 60 cents a pound when the market price was only 1¾ cents a pound. The shucks were delivered and consumed, and plaintiff's demand for payment of the contract price being refused he brought suit. Both the Court of Claims and this Court awarded only the market price of the shucks. Both courts held that the price demanded was unconscionable, and that the judicial system could not be used to enforce the contract. The opinion of this Court quotes and relies upon the rule as stated in *Scott* v. *United States, supra,* that—

> If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. *James* v. *Morgan,* 1 Levinz, 111; *Thornborow* v. *Whitacre,* 2 Lord Raymond, 1164; *Baxter* v. *Wales,* 12 Massachusetts, 365.

In *Burke & James, Inc.* v. *United States,* 63 C. Cls. 36, discussed in detail, *supra,* pp. 46–48, the court

held that one ground for denying enforcement to a "bonus-for-savings" provision was that recovery of the sum claimed would result in the award of profits "grossly exorbitant and unreasonable" (p. 58). The court stated and quoted from its opinion in the *Hume* case, as follows (pp. 58–59):

> 'The fraud, if it is necessary to suppose any in this case, consisted in afterwards taking advantage of the defendant's ignorance or mistake, and of attempting to enforce the performance of a contract, such, as Lord Hardwicke expresses it, "as no man in his senses would make or as no honest man would come into." These citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control and will, without the intervention of courts of equity, protect the parties against their enforcement. If it be so in suits on contracts between private parties who act by and for themselves, how much more is it so in suits on agreements by the United States, acting always through public officers, who are mere agents, required to act in good faith toward their principal according to the laws of the land, as everybody dealing with them are bound to know.'

See also *Beard* v. *United States*, 3 C. Cls. 122; *Bassick* v. *Aetna Explosives Co.*, 246 Fed. 974.

Respondent contends and the court below held, however, that the only measure of unconscionability is that contained in the apothegm of Lord

Hardwicke in *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sr. 125, 155, that those bargains are "inequitable and unconscientious bargains; and of such even the common law has taken notice" which are "such as no man in his senses * * * would make on the one hand, and as no honest and fair man would accept on the other."

Even if tested by this standard, Bethlehem's claimed profits are unconscionable. A Government representative "in his senses" might well have entered into these contracts at any price because of the war necessities. Even so, under the language of the dictum relied on, the contract may be condemned if in such circumstances "no honest and fair man would accept" the bargain. Indeed, as reported in 1 Wils. K. B. 286, at 295, 95 Eng. Rep. 621, 627, Lord Hardwicke's dictum speaks of a bargain which "no man in his senses would make, *or* as no honest man would come into" (italics supplied). Cf. *Hume* v. *United States*, 21 C. Cls. 328, 331. See, also, a third report of the opinion in 1 Atk. 301, at 352, 26 Eng. Rep. 191, 224. The conclusive answer, however, is that the dictum was not intended to have and never has been given application where unfair advantage has been taken of another's necessities. Lord Hardwicke distinguished four situations in which equity would presume fraud. The first class is that in which fraud is suggested from "the intrinsic nature and subject of the bargain itself", and it was to this class only

that Lord Hardwicke applied the description relied on by respondents. 2 Vesey Sr. at 155. He added as a separate distinct class that where fraud is presumed "from the circumstances and condition of the parties contracting * * * to prevent taking surreptitious advantage of the weakness or necessity of another; which knowingly to do is equally against conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other" id. at 155–156. The other two classes are not material to the discussion here.

The distinction has been consistently recognized in the decisions, although the American courts will not presume that an unfair advantage of disabling necessity has been taken in the absence of proof. Where the only ground relied on to invalidate the contract is the inequality of the bargain (or inadequacy of consideration), the disparity must be so gross that the courts will presume fraud. Such was the situation in the *Hume* case. But where it is shown that advantage has been taken of another's necessities a much smaller degree of unfairness is enough. The courts have frequently set aside salvage agreements where the force of circumstances was insufficient to constitute compulsion, but the salvor took advantage of distress to exact an agreement for compensation twice or more the fair value of its services. *The Don Carlos,* 47 Fed. 746 (N. D. Calif. 1891); *The Young America,* 20

Fed. 926 (D. N. J. 1884); *Brooks* v. *Steamer Adirondack*, 2 Fed. 387 (S. D. N. Y. 1880); *Magnolia Petroleum Co.* v. *National Oil Transport Co.*, 281 Fed. 336 (D. Texas); *The Theodore*, 1 Swabey, 351. In *The Young America*, a vessel exhibited a signal for a tug when a dangerous fire broke out in the near vicinity, causing great excitement and fear on the vessel. The tugmaster demanded $1,000 for his services, although, as the court found, there was no risk to it and its services were worth only $300. In *The Don Carlos*, the salvor demanded $10,000 for services found to be worth only $5,500. In the *Brooks* case, the salvor demanded $4,000 for services found to be worth only $1,500. The agreements in these cases were cited by this Court in *The Elfrida*, 172 U. S. 186, at 196, as illustrative of contracts invalidated because of unconscionability. In the *Brooks* case, the court said (p. 392):

> It is not because the bargain proves to be a hard one that the courts of admiralty set aside such a stipulation. It is because it is obviously unjust, and the parties do not deal on equal terms. The apprehension expressed by the learned counsel for the libellant, that the setting aside of such contracts will tend to discourage the rendering of salvage services, is unfounded so long as the courts award, as they endeavor to do in every case, such as a sum as will be not only a quantum meruit for the time and labor employed in the service, but a reliable reward for the

> assistance rendered and the perils voluntarily incurred. If the amount agreed upon exceeds somewhat the accustomed measure of this liberal reward, it will not be disturbed, if deliberately and understandingly assented to, without the judgment of the promising party being overborne by the distress in which he is placed; but where the amount agreed upon is more than double, or, as in this case, nearly treble, that measure of liberal reward, the upholding of the contract would invite rapacity, and tend to prevent the rendering, upon just and proper terms, of salvage service under circumstances in which it is for the interests of commerce that it should be offered and not refused.

The principle is one of general application. Contracts for the purchase of land from a vendee of intemperate habits and in financial straits have been held unconscionable where price paid was only one-half or one-third the fair value: *Matthis* v. *O'Brien,* 137 Ky. 651, 658; cf. *Beard* v. *Campbell,* 2 A. K. Marshall (Ky.) 125, 126–127; *Johnson* v. *Woodworth,* 134 App. Div. 715; *M'Kinney* v. *Pinckard's ex'or,* 2 Leigh (Va.) 149, 156. And agreements to loan money to persons in financial distress on condition that the borrower purchase land at a price twice or more its fair value have likewise been invalidated as unconscionable without regard to the analogy of usury. *Administrators of Hough* v. *Hunt,* 2 Ohio 506; *Butler* v. *Duncan,* 47 Mich. 94; *Musselman* v. *Knott;*

7 Ky. L. Rep. 380; cf. *Bither* v. *Packard*, 115 Me. 306; *Stiefler* v. *McCullough*, 97 Ind. App. 123, 130–131; see Note (1935) 35 Col. L. Rev. 1090, 1096.

*Bassick* v. *Aetna Explosives Co.*, 246 Fed. 974 (S. D. N. Y.), a case between private parties, dealt with a situation not markedly different than that now at bar. The court said (pp. 992–993):

> But I go further. In my opinion, if it were to be found that the board knew all the facts, they had no power to authorize an agreement so disproportionate as to be unconscionable * * *.
>
> * * * * * *
>
> Under this so-called "overage" arrangement, Bassick was to receive $1,800,000; i. e., 31 per cent. in round numbers, on a sale of $5,800,000—an amount obviously so far above anything which can be called reasonable, or even liberal, in the circumstances, as to characterize the agreement, within the famous observation of Lord Hardwicke in *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sen. 125, 155 * * *.

The principle applies with even greater force to contracts with the Government to supply war necessities. The power of eminent domain exists, it is true, to protect the Government from unreasonable demands, but this power together with the statutes previously cited (*supra*, p. 71) explicitly evidence a policy that the Government should not be required to pay more than a reasonable price for

war supplies. Since neither expedient could assure the service of an unwilling organization, as the Master found (R. 539), they are useful here not as a means by which the Fleet Corporation could have escaped its predicament but as a policy which must guide the judicial scrutiny of the contracts. See the cases cited *supra*, p. 72. In brief, while the law tolerates some hard bargains between private individuals, it condemns any effort to take advantage of the Government's wartime necessities.

As was said in *United States* v. *A. Bentley & Sons Co.*, 293 Fed. 229, 236 (S. D. Ohio), "The contract being made when an emergency existed and the defendant being required to report and account to and thus to deal with a public officer, the fairness of its transactions will be more rigidly scrutinized than if it had been dealing with a private individual * * *." See also *Beard* v. *United States*, 3 C. Cls. 122, 129; *Hume* v. *United States*, 21 C. Cls. 328, 331; *Mann* v. *United States*, 3 C. Cls. 404, 411.

Applying these settled principles, it seems clear that straight cost-plus contracts for construction of vessels in terms providing a fee of 20 percent or 25 percent of actual or estimated cost would be plainly unconscionable. Bethlehem's performance was no more than that due under a straight cost-

plus contract, and the contracts as construed by Bethlehem required, at the time of their execution, no more. They stand, therefore, on the same footing. A small departure from the norm of 10 percent might be justified but a profit more than twice the usual amount has no discernible relation to the value of the service rendered and, in the absence of some explanation, can only be deemed an unconscionable result of trading on the Government's necessities.

D. THE GOVERNMENT AGENTS WERE WITHOUT AUTHORITY TO ENTER INTO THE CONTRACTS

We have shown that the contracts, construed to permit Bethlehem to participate in "savings" however caused, are void and unenforcible because (a) they make a gift of Government property; (b) they were exacted under duress; and (c) they are unconscionable through giving Bethlehem inordinately large profits. Stated otherwise, the contracts are void and unenforcible because the Government officers had no authority to bind the Government to such agreements. *Hume* v. *United States,* 132 U. S. 406 at 414–415; *Burke & James, Inc.* v. *United States,* 63 C. Cls. 36 at 56–57; *Beard* v. *United States,* 3 C. Cls. 122, 128.

The conclusion seems incontestible, once any of these grounds of invalidity be established. It may, however, be appropriate to add a word directed to the situation where the contracts would be placed

at about the border-line of any one of these categories. It might be suggested that the courts should follow the administrative judgment of the contracting officers of the Fleet Corporation if there be room for differences of opinion as to the reasonableness of the contracts.

The suggestion would, in the first place, be inapplicable to the case at bar. For, as we have shown, the duress and the inordinate nature of the profits are of the first magnitude. In the second place, any such view would be the adoption of a self-defeating formula. We do not attack the administrative judgment of Piez, Bowles, and Radford. We insist, rather, that they were faced by insuperable obstacles in their negotiations with Bethlehem. They were charged with the duty of getting ships upon which the national existence might rest. They had to have ships; they could not refuse to deal with Bethlehem. It is idle to speculate whether shrewder or more determined men might somehow have overcome this tremendous negotiating advantage placed in the hands of Bethlehem. The administrative judgment which the courts must respect is the informed judgment of experts; it is not a decision resulting from the helplessness of ordinary men faced by a contractor determined to capitalize to the full on his country's need.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted.

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